No. 15801

IN THE

United States
Court of Appeals
For the Ninth Circuit

GLADYS E. LINCOLN GRAMM,

Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Last Will and Testament of Henry Lincoln, Deceased,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Idaho, Southern Division

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JURISDICTION

By reason of diversity of citizenship, the jurisdiction of this case is that of a federal court of general jurisdiction substituted for a state court of general jurisdiction.

"It has been frequently held by this court that

a creditor can proceed in equity against the heirs who have received the ancestor's estate for satisfaction of his claim against such estate which has accrued after the lapse of time limited for authenticating it against the administrator, or after the close of his administration."

Madison v. Buhl, 51 Idaho 564, 8 P. 2d 271, 273

The federal court's broad chancery jurisdiction has here been invoked because fraud is alleged and in order to impress a trust implied or constructive which arises by operation of law, of the entire estate, or of such estate, if any, as may have been fraudulently transferred.

Equity will impress a trust where legal title is obtained by fraud, violation of confidence or fiduciary relationship, or in any unconscientious manner.

"*When property subject to a trust is fraudulently transferred, or when one person, in fraudulent violation of his fiduciary duty, acquires property which equitably belongs to another, or when one person by his actual fraud obtains the title to property in which another is beneficially interested, equity may work out and protect the rights of the beneficial owner by regarding the property as though it were actually impressed with a trust in the hands of the one who holds the legal title, by treating such person as though he were an actual trustee, and by enforcing such trust by means of a conveyance,* accounting, pay-

ment, injunction, and other appropriate remedies. There is no other effect of fraud more remarkable, and none exhibits more clearly the power of courts of equity to deal with the substantial realities under the appearance of external forms."

2 Pomeroy's Equity Jurisprudence
(3rd Ed.) 1658, Sec. 920

Also:

Rest., Trusts Vol. I, Sec. 170 (2)

STATEMENT OF THE CASE

(1) Appellant was completely absent from Idaho at all times during the period in question. (tr. pp. 49, 51)

(2) Appellant's claim was presented in time under the statutory proviso applicable to non-resident creditors without notice. (tr. pp. 49, 51)

(3) Counsel for executrix failed and flatly refused to divulge the date of first publication of notice to creditors, upon specific request being made of him, and of his fiduciary client therefor by counsel for appellant. (tr. p. 51)

The foregoing facts are undenied, and "equity will not suffer a wrong to be without a remedy."

19 Am. Jur. 311, Sec. 451.

These facts now stand admitted, since undenied.

ARGUMENT

I. APPELLANT'S CLAIM WAS TIMELY PRESENTED IN VIEW OF SECTIONS 15-604 and 15-607, IDAHO CODE.

(1) Appellant's claim was presented ten days before the final decree of distribution was entered. When read in pari materia, Secs. 15-604 and 15-607 Idaho Code so provide.

It is appellant's paramount point that her claim was presented to the attorney for appellee, thus to appellee *before* the final decree of distribution was entered. Such presentment is conclusively shown in the transcript herein, pages 13, 25, 49 and 51. Such presentment is not denied and *became effective* because at that time appellant was a non-resident of the State of Idaho, as is likewise shown by the transcript, page 3, paragraph I of the complaint, and not denied in the answer, paragraph XI. (Also tr. pp. 46 and 49)

At that time and prior thereto appellant did not know the time within which claims had to be filed as the transcript shows. (tr. p. 49)

Appellee does not contend appellant had actual notice of the time for filing claims; her defense rests solely on two points: first, that the affidavit, showing appellant was a non-resident and was without actual notice of the time for filing claims when she presented her claim, was not filed until after the final decree of distribution, and no order was made

authorizing the presentation of the claim; and, second, that the proceedings in the state court are res adjudicata.

Appellee in her brief states:

"A belated claim of a non-resident creditor is of no validity unless its presentation be preceded or accompanied by an order of Court permitting it to be presented."

top of page 12

"The last sentence of the specification, namely, that the time for filing an affidavit is not definite is a mere quibble."

top of page 16

The statute does not require either. Sec. 15-604 Idaho Code.

The facts of non-residence, absence, and lack of knowledge are the determining factors, not when or how made to appear.

Mason v. Pelkes, 57 Idaho 10, 17 59 P. 2d 1087

Call v. R.M.B.T. Co., 16 Idaho 551, 558 102 P. 146

Mendini v. Milner, 47 Idaho 322 276 P. 35

Pacific States Savings, Loan and Building Co. v. Fox, 25 Nev. 229 59 P. 4

Young v. Campbell (Okla.) 16 P. 2d 65

Certainly, if non-residence and lack of knowledge be disputed, proof thereof and a finding thereon would have to be made. But where there is no denial, as herein, and the only showing made, though made after the presentation of the claim, is conclusive that appellant was absent and without knowledge of the publication, her claim was filed in time. Proof of publication of notice to creditors, for instance, is not the prerequisite of a decree, but the fact of publication is basic.

Appellee's statement, page 5, that "Precisely the same argument could be made in an action brought on a rejected claim six months or six years after notice of its rejection." is a complete non sequitor because the claim herein was in compliance with the statute, 15-604 Idaho Code, being presented before the final decree of distribution. The existence therefore, of the claim, admittedly presented, of a non-resident claimant and her entire lack of knowledge (tr. pp: 49, 51) are not denied in this case and, if necessary, can be proved. In any case, the delay has no nullifying effect.

Sterling v. Title Insurance & Trust Co., 53 CA 2d 583 128 P. 2d 31

Staley v. Brannan, 243 P. 2d 346, 206 Okla. 292

While the main point in Staley v. Brannan was rights under domestic and ancillary administration, the principle of the claim being on time when presented before the decree of final distribution was

approved in State v. District Court of 1st Judicial District, (Mont.) 43 P. 2d 682.

Appellee falls into the same error the State Court did when, on page 4 of her brief, she states that Section 15-604 Idaho Code permits the probate court for good cause to be shown to order an extension for presentment only if such extension is requested before a decree of distribution. The statute does not so declare. All it states is that "it may be presented at any time before a decree of distribution is entered" when it is made to appear that claimant had no notice by reason of being out of the state.

The statute does not directly or by implication require a showing *before* the presentation. The timely presentation of the claim is the sine qua non. The affidavit or showing can be made at some time later in the court having the claim before it, in this suit.

The statement on page 15 of appellee's brief that "The question is not whether the claim was presented before the decree of distribution was entered, but whether it was presented before the time limited in the notice to creditors for the presentation of claims" is truly appalling in its complete disregard of Sec. 15-604 Idaho Code. Statutes may not thus be blandly discarded. All of appellee's argument, therefore being of no greater efficacy, must fall of its own weight.

Appellant has never contended nor stated that appellee was under any duty to see that appellant presented her claim in time. Appellee, at page 7 of her brief, thus misstates appellant's position and attempts to thus distract by dragging a red herring.

Appellant stated and contends here that appellee *violated* the trust imposed on her by appointment as executrix when she failed and refused to give information (tr. p. 51) as to the time when claims had to be filed. Such information was material.

(2) Far from attempting to substitute the principle of unjust enrichment for the legal requirements, the principle of unjust enrichment merely supports appellant's allegations and prayer that a constructive trust should be impressed upon the estate in the hands of appellee. (tr. p. 43)

Asher v. Bone, 100 Fed. 2d 315, 317 (2) (11)

For specific performance of a property settlement agreement, no presentation whatever of a claim is required.

Ashbauth v. Davis, 71 Idaho 150, 227 P. 2d 954, 32 ALR 2d 361

Ferrel v. McVey, 71 Idaho 339, 232 P. 2d 134

Kalaterna v. Wright, 94 CA 2d 926, 212 P. 2d 32, Syl. (16)

Baird v. Knutzen, 49 W. 2d 308, 301 P. 2d 375, 376 (2)

Casady v. Scott, 40 Idaho 137, 237 P. 415, 420

Toulouse v. Burkette, 2 Idaho 184, 10 P. 26, and,

49 Am. Jur. 96, Sec. 79, quoted with approval In re Davis' Estate, 171 Kans. 605, 237 P. 2d 396, 402 (9)

II. THE STATE DECISION WAS MERELY A REFUSAL BY THE SUPREME COURT TO CONSIDER APPELLANT'S CLAIM FOR THE REASON THAT CREDITOR'S CLAIM HAD BEEN REJECTED AND THERE WAS NO ISSUE FRAMED IN THE PROBATE COURT.

(1) There was no record prior to the decree of distribution on the issue between claimant and the executrix in the probate court. The record is here as an independent suit on the rejected claim for the first time. The subject matter of this suit was not before the probate court, nor any other state court. It is here as an independent suit against the personal representative and the heir, one and the same person.

Appellant's entire lack of any plain, speedy or adequate remedy at law is clear and appellant filed her complaint in the federal court seeking consideration of her charge of fraud which is made the basis of this her independent adversary suit to establish a trust in equity, as well as her statutory suit on the rejected claim under Secs. 15-803 and 15-609 Idaho Code.

(2) It is a direct attack, not a collateral attack upon the decree of distribution.

Swinehart v. Turner, 38 Idaho 602, 224 P. 74

Asher v. Bone (Idaho), 100 Fed. 2d 315

Had appellant received notice in any form, even a clipping from the Boise newspaper, showing the date of the first publication of notice to creditors

from the executrix, she would have been in a position for a period of ten days to appear and file her affidavit of non-residence and non-notice. Was it or was it not because of appellee's refusal to divulge this material and important information that appellant failed to so do? Certainly, the delay in presenting her affidavit was a delay which was due in part to appellant, but that part was not necessarily fatal. The last one duty should be hers. The last ten days were fatal in the probate court only. The fiduciary duty was appellee's duty. Her counsel's act was her act. It was and is fatal to the decree of distribution.

Conceding counsel, by notice that probate proceedings had been instituted and were pending, was charged with the duty of making inquiry, this he did and went at once to the most reliable source of information, the personal representative of the estate, and did not ask any layman or other lawyer. It was Mr. Shane who was to determine, as stated by him in his letter whether or not an affidavit would be required. (tr. p. 49)

His request was made not for the purpose of asking the executrix or her counsel to "run errands" for appellant, nor for appellee, personally as beneficiary, but simply to request compliance with the duty which the executrix owed as fiduciary. As stakeholder she was fiduciary for all interested parties, owed to all interested persons, and especially to nonresidents, a very clear duty of impartiality under Secs. 15-604 and 15-607 Idaho Code, as well as notice under Sec. 15-601 Idaho Code requiring notice to

creditors to be given as provided by law. Appellant's disadvantage appears clear, on the admitted facts; the statutes safeguard her as they were enacted to do.

Appellant's counsel did (what any Idahoan would) inquire of the attorney for the estate: the fountain head for such information; to whom the probate court had referred. Why should counsel beg that question?

III. WHETHER APPELLANT WAS MISLED BY MR. PAINE'S LETTER IS IMMATERIAL.

It was fraud in law for a personal representative to withhold the material information which was admittedly withheld.

Appellee quotes the transcript (tr. pp 51-52), *not appellant's brief*, when she says that the last point appellant labors is that she was misled by a letter. We do not think that the court can possibly be misled by counsel for appellee as to appellant's position in this matter.

We do not rely upon any misrepresentation or misleading statement. We do rely upon the concealment of a material fact which the personal representative as fiduciary was duty bound as fiduciary, if not legally bound, Sec. 15-601 Idaho Code, to give to all creditors whether resident or non-resident of the State of Idaho.

This fiduciary was also made a defendant individually for the reason that she used her legally impartial position as personal representative of the

estate to further her individual interests. This was done through her counsel who obviously and palpably wrote the letter of February 9, 1956, in the interests of Elizabeth Lincoln individually. Therefore, neither the fiduciary nor her counsel were impartial as between the appellant and appellee, the former wives of the decedent.

That it is fraud in law for a personal representative to take a position in which his individual interests will conflict with his duty as impartial and stake-holder fiduciary, is too well established to require any citations of authorities.

Woodson v. Raynolds, 42 N.M. 161, 76 P. 2d 34, 39

2 Bancroft's Probate Practice, 297, Sec. 341, (Note 20)

Flynn v. Driscoll, 38 Idaho 545, 223 P. 524, 34 ALR 352

Blackinton's Estate, 29 Idaho 310, 158 P. 142

State Insurance Fund v. Hunt, 52 Idaho 639, 17 P. 2d 354

Chapin v. Stuart, 71 Idaho 306, 230 P. 2d 998

Bunn v. Hanson (Idaho), 103 Fed. 2d 685

Wiesenthal v. Abe Goff, 63 Idaho 342, 349, 120 P. 2d 248

Benjamin v. Dore, 47 Idaho 582, 586, 277 P. 565

In re Sullivan's Estate (Ariz.), 78 P. 2d 132, 137, 50 Ariz. 483

Baker v. Baker, 142 SW 2d 737

Wells v. Zenz, 83 CA 140, 256 P. 485

2 Bancroft's Probate Practice 296, Sec. 340

"Our probate laws were adopted from the California Code, and while we are not bound by the California decisions thereon, nevertheless, they are of high authority on the statutes construed."

Short v. Thompson, 56 Idaho 361, 375, 55 P. 2d 163, 169

Simons v. Davenport, 66 Idaho 400, 160 P. 2d 464

In re Reil's Estate, 211 P. 2d 407, 70 Idaho 64

Stafford v. Field, 70 Idaho 331, 218 P. 2d 338, 341, 20 P. 2d 670

Palpably and actually, such concealment constituted extrinsic fraud, not intrinsic.

"Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been kept in ignorance thereof, or has been prevented from fully participating therein, there has been no true adversary proceeding, and the judgment is open to attack at any time."

Westphal v. Westphal, 20 Cal. 2d 393, 126 P. 2d 107

Harkins v. Fielder (Cal.), 310 P. 2d 423, 428

We submit that Idaho law is not entirely limited to "local law" (so called by counsel), particularly when the equity powers of a federal court are here invoked.

We also submit that the foregoing decisional law is respectable, even though "local." What is "local law"? Is it not the decisions of the Idaho Supreme Court and the legislative enactments, commonly known as statutes? We respectfully submit all are to be taken into consideration.

It comes with poor grace from counsel for executrix who had published notice to creditors that they present claims against the estate immediately thereafter to complain of lack of proof or affidavit of what is an acknowledged fact, having concealed the date of first publication of notice to creditors. How can such an argument have any weight? (tr. pp. 14, 15) Why give *any* notice to creditors?

It ill behooves any fiduciary upon whom, of all persons, counsel for any non-resident creditor should be entitled to rely for accurate information, to conceal that very information when needed, and when requested in writing, to be heard to say: that inquiry should have been made of another lawyer, or "even a layman." (tr. p. 15)

Appellant's counsel did not ask fiduciary to "run errands" for appellant and thereby make her a "scapegoat." (Appellee's Brief, page 15)

IV. INCONSISTENCY BETWEEN THE DECISION OF THE IDAHO SUPREME COURT AND THE STIPULATION IS APPARENT.

(1) The statement in the decision obviously refers to the failure of appellant to present her claim within four months, not to the proviso of Sec. 15-604 Idaho Code. This proviso is still the law, although a proviso.

(2) The question is whether the claim was presented within the period prescribed by the statutory proviso, as much a part of the statute as the portion thereof referred to by the court.

"A claimant having no notice as provided in Chapter 6 by reason of being out of the state" has a right to present her claim "any time before decree of distribution is entered."

We submit the following reading of the statute to clarify the version that appellant has in this regard:

> "When (*ever*) it is made to appear by the affidavit of a claimant to the satisfaction of a court or a *judge* thereof that the claimant had no notice (to creditors) by reason of being out of the state, the claim may be presented at any time before a decree of distribution is entered." (Italics ours)

Nothing is said about what court or what judge, but it is fair to assume that "the proper court" and a proper judge are referred to. The federal district court in lieu of the state district court, having general jurisdiction of this suit on a rejected claim, we respectfully submit, is "the proper court."

V. APPELLANT DISCLAIMS MAKING ANY CHARGE THAT THE NOTICE REQUIRED BY IDAHO LAW IS UNREASONABLE.

(1) Scott v. McNeal (Appellant's Brief, p. 16) simply shows that constitutional due process is applicable in in rem proceedings, not to inject herein a new point as implied by counsel.

(2) In answer to appellee's contention that this appellant's contention is so "startling" (p. 17 Appellee's Brief) we call the court's attention to the very wording of the letter of February 9, 1956, which letter does not contain any rejection or any approval, formally or informally, of the creditor's claim. The Supreme Court did hold that the attorney "in substance" rejected the claim. This suit is brought on the rejected claim.

CONCLUSION

We, therefore, submit that this appellant presented her claim in time; that this appellant, a non-resident creditor, absent from the state at all times in question, had no notice "by reason of being out of the state." That in substance qualifies this creditor to "present" her claim to the personal representative "at any time before decree of distribution." The claim was so presented and ignored.

We also respectfully submit that the concealment of the date of first publication of notice to creditors, when specifically requested by such crippled, disadvantaged, or disabled, appellant-creditor, consti-

tutes extrinsic fraud, since the creditor-appellant was thereby deprived of her traditionally American opportunity for her day in court on the facts of her case by filing her affidavit which she filed in the probate court promptly after discovery of the need therefor; appellant assails for fraud, directly, and not collaterally, the decree of distribution.

Harkins v. Fielder, 310 P. 2d 423, at 429 (11) (Calif.)

We, therefore, respectfully urge that this independent suit definitely calls for a trial, not only of the statutory action on the rejected claim, but of the question of extrinsic fraud, and the logical need for a trusteeship to be impressed upon the estate, or any part thereof in the hands of appellee individually.

Dated at Boise, Idaho, March 27, 1958.

Respectfully Submitted,

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